Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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COMPAGNIE EURALAIR, S.A,
*Petitioner,*

-against-

GENERAL ELECTRIC COMPANY,
*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should the Petition be Granted to Exercise This Court's Supervisory Power and Correct the Court of Appeals Departure From Accepted Practice on Appeal by Refusing to Consider Arguments on Appeal That Were Properly Presented to the District Court?

2. Should the Petition be Granted to Exercise This Court's Supervisory Power by Correcting the Court of Appeals' Departure From the Normal Course of Procedures Regarding Summary Judgment in Refusing to Grant Euralair a Meaningful Opportunity to Present Evidence Barring Summary Judgment Based on Improper Exclusion of Parol Evidence?

3. Should the Petition be Granted to Exercise This Court's Supervisory Power by Correcting the Court of Appeals' Departure From the Normal Course of Procedures Regarding Summary Judgment in Refusing Refusal to Allow Euralair a Meaningful Opportunity to Present Evidence Barring Summary Judgment Establishing GE's Agreement to Take Assignment of the Boeing Contract in Satisfaction of the Advance?

4. Should the Petition be Granted to Exercise This Court's Supervisory Power Over the Lower Courts and the Federal Rules of Civil Procedure By Correcting the Court of Appeals' Erroneous Sanctioning of the District Court's Dismissal of

the Counterclaim Contrary to Federal Rule of Civil Procedure 8?

## LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Supreme Court Rule 29.6, Petitioner, Compagnie Euralair, S.A., provides the following information: Euralair S.A. is a company organized under the laws of the Republic of France. Euralair S.A. has an ownership interest in the following entities: Construction Aeronautique, Mooney Aircraft (USA), Transport Aerien, Euralair Affaires, Aviation D'Affaires, Euralair International, Flotte Boeing Charter et Cargo, Euralair Industries, Maintenance D'Avions, Euroline Maintenance, Assistance Technique Orly et Rossy, CFLA, Air Littoral, Lignes Regulieres Regionales, Air Liberte, and Lignes Regulieres.

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## OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, A41) is unreported. The opinion of the district court (App. *infra*, A1) is reported in the official federal case reporter at 945 F. Supp. 527.

## JURISDICTION

The United States District Court for the Southern District of New York exercised diversity jurisdiction in this case under 28 U.S.C. § 1332. The United States Court of Appeals for the Second Circuit had jurisdiction to hear the appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on October 30, 1998 (App. *infra* A44). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Petitioner Compagnie Euralair, S.A. ("Euralair") is a French corporation engaged in the commercial airline business. (App. *infra* A1). Respondent General Electric Company ("GE") is, among other things, a manufacturer of jet aircraft engines. This dispute arose from GE's efforts to persuade Euralair to use its jet engines on aircraft Euralair proposed to purchase from Boeing. GE offered significant incentives, ostensibly intended to benefit Euralair, in seeking Euralair's business, but those incentives resulted in this litigation and the entry of a multimillion dollar judgment against Euralair without a trial or the taking of any discovery.

### A. GE Competes to Equip Euralair's New Aircraft With its Jet Engines.

At the beginning of the decade, Boeing prepared to introduce a new jet airplane to the aviation market -- the Boeing 777. Euralair became a "launch customer," that is, one of the first commercial purchasers, of the new plane when it contracted to purchase two new Boeing 777 aircraft in December of 1990. (App. *infra* A3-4).

As the aircraft were not to be delivered to Euralair until 1997, Euralair had time to choose among three manufacturers of jet engines to be fitted on the planes. The three manufacturers, Respondent General Electric Company ("GE"), Rolls Royce, and Pratt & Whitney, engaged in a spirited competition to persuade Euralair to select their particular jet engine for the two aircraft. (App. *infra* A3-4). GE in particular wanted Euralair to become one of the first companies to risk buying a 777 equipped with GE's new engine, thereby demonstrating to other airlines and potential purchasers faith in the engine's manufacturer. (App. *infra* A3-5, 20-24)

### B. Euralair Chooses GE Engines After GE Gives $25 Million Incentive Package.

Euralair eventually chose GE's engines for the two launch planes, agreeing to select four of the new GE90-B4 engines for the two Boeing 777s it intended to purchase, and Euralair also agreed to purchase a spare GE90-B4 engine. (App. *infra* A3-4). To secure this choice, GE gave Euralair an incentive package which included a $20 million rebate payable upon delivery of the planes, with a $10 million interest-free

advance on that amount given to Euralair in December of 1992. (App. *infra* A4-5).

Euralair claims that this $10 million advance was never meant to be repaid but was (along with the remaining $10 million of the rebate) to be earned pro-rata upon the delivery of the planes. (App. *infra* A20-21). In support of this claim, Euralair also references the ongoing negotiations between Euralair and GE, in particular, GE's efforts to persuade Euralair to chose its engines over those of other manufacturers. (App. *infra* A4 n.2, 20-24).

### C. GE Structures the Rebate/Advance Deal as if it Were a Loan to Euralair.

Having agreed to the rebate/advance deal with Euralair, GE proceeded to structure the deal. Euralair claims that, due to the public relations concerns, GE set up the deal to make it appear the rebate was a loan from another company, Automated Cash Management Trust ("ACMT"), with GE ostensibly acting as a guarantor of the loan. (App. *infra* A4 n.2). In this transaction, GE could appear to be just a "guarantor" of the loan, even though it was the one who paid the interest and was to pay the principal upon delivery of the planes. (App. *infra* A4-14).

The documentation relied on by the District Court does not embody the entire incentive arrangement, but only purports to deal with the $10 million advance. (App. *infra* A3-7). The three parties, GE, Euralair, and ACMT, executed a number of agreements on December 22, 1992 (App. *infra* A5-6), including:

(1) the "Note Purchase Agreement" between ACMT and Euralair, under which ACMT agreed to pay Euralair $10 million in return for ten $1 million notes, which Euralair agreed to repay by May 31, 1997, with no obligation to pay any interest unless it defaulted (App. *infra* A5-6);

(2) the "Notes," guaranteed $1 million notes owed by Euralair to be held by ACMT and guaranteed by GE (App. *infra* A6);

(3) the "Guaranty Agreement" between ACMT and GE, whereby GE agreed to pay the noteholder fees (prematurity interest), and upon any default of the notes, GE guaranteed the principal and postmaturity interest, with an option upon default to either purchase the notes of pay the principal and interest; (App. *infra* A6);

(4) the "Reimbursement Agreement" between GE and Euralair, under which Euralair was to reimburse GE for paid principal and other costs, wherein GE had the discretion to issue "prepayment instruction" under certain events, including the failure to order the spare engine by April 30, 1995, that would trigger a default under the Note Purchase Agreement (App. *infra* A6); and

(5) a "Security Agreement" between GE and Euralair, under which GE accepted the assignment of the purchase contract with Boeing as collateral for its obligations as guarantor of the notes (App. *infra* A6)

The parties also entered into a number of letter agreements (App. *infra* A6-7).

Under the Security Agreement, GE agreed that, in the event Euralair could not for any reason purchase the Boeing aircraft, it would accept assignment of Euralair's right to do so. Euralair contends that this assignment, by which GE would benefit greatly in receiving early delivery of the aircraft, was an election by GE that taking the assignment would be the only remedy it would pursue in the event Euralair could not purchase the aircraft. (App. *infra* A17-20).

### D. Euralair Loses Contract With Air France and Seeks a Delay in Delivery of the New Jets.

Upon discovering that its contract with the government-operated airline Air France was not going to be renewed, Euralair was forced to seek a delay of the delivery of the Boeing 777s. (App. *infra* A12). Euralair also had no available funds with which to purchase the spare GE90-B4 engine (App. *infra* A23-24). Boeing, in an attempt to find a solution that would avoid a default by Euralair on the contract for the planes, agreed to move the delivery date of the jets from April and May of 1997 to October and November of 1998. (App. *infra* A12). Euralair contends that because the Boeing deadline was pushed back, any obligation that it had to purchase the spare GE engine was also moved, as provided in Letter

Agreement No. 2 between GE and Euralair. (App. *infra* A12-13). GE contends that the spare engine deadline was fixed by the Reimbursement Agreement and disputed the applicability and admissibility of the letter agreement. (App. *infra* A13).

### E. GE Claims Euralair is in Default on its "Loan" and Refuses to Accept Assignment of the Boeing Contract as Previously Agreed.

While Euralair did not buy the spare engine by the April 30, 1995 deadline, Euralair was willing to assign its Boeing contract to GE, as it had promised to do in the event it was unable to purchase the engine or the planes. However, GE would not accept the assignment, and after refusing to accept the assignment as agreed, GE issued a "prepayment instruction" under the Reimbursement Agreement on August 21, 1995. (App. *infra* A9). On January 29, 1996, GE sent notice to ACMT that the prepayment instruction triggered a default under the Note Purchase Agreement and the Guaranty Agreement. (App. *infra* A10). In this notice, GE also informed ACMT that GE would exercise its rights under the Guaranty Agreement to purchase the ten notes from ACMT. (App. A10). After the alleged transfer of the notes to GE, GE sent a letter to Euralair on January 30, 1996 informing Euralair of an acceleration of the notes and demanding that Euralair pay GE, the alleged new noteholder, the principal, interest, and costs and expenses it claimed were now due. (App. *infra* A10).

### F. GE Promptly Sues Euralair.

A week after sending that demand, GE commenced this action in the United States District Court for the Southern District of New York on February 6, 1996. GE

did not dispute that the arrangements between it and Euralair were an incentive to persuade Euralair to purchase the spare engine and order its engines for the 777s. Referring to the various financing agreements only, GE then claimed that Euralair breached the Reimbursement Agreement by failing to order the spare engine by April 30, 1995, an event triggering GE's right to purchase the notes under the Guaranty Agreement, in turn triggering its new right as alleged noteholder to demand payment of the accelerated notes. (App. *infra* A8-26).

Euralair answered and asserted that the financing agreements did not reflect the intended agreement between the parties. (App. *infra* A8-26). Euralair also raised the defense of estoppel and counterclaimed for a breach of the implied covenant of good faith under New York law. (App. *infra* A25-31). It is undisputed that GE did not file a reply to the counterclaim within 20 days.

### G. Prior to Any Discovery, the District Court Grants Summary Judgment to GE and Dismisses Euralair's Counterclaim.

Prior to any discovery taking place, GE filed a motion for summary judgment and motion to dismiss the counterclaim. The summary judgment motion was supported by the financing agreements and some letters, with no factual affidavit or deposition testimony. Euralair responded by submitting factual affidavits from persons with knowledge of the arrangements with GE, explaining how the financing agreements did not reflect the actual intention of the parties but only represented GE's efforts to disguise the rebate as a loan. (App. *infra* A1-32).

The District Court granted GE's motion for summary judgment and dismissed Euralair's counterclaim and ultimately awarded interest, costs, and attorneys fees. (App. *infra* A34-37). In granting the summary judgment motion, the District Court construed Letter Agreement No. 2 and the Reimbursement Agreement "as one agreement" and found that the agreement "must be interpreted in favor of the specific provision (that the order deadline was April 30, 1995) rather than the more general provision (that the order deadline was 24 months before delivery of the first Boeing plane)." (App. *infra* A14-15). The District Court refused to consider factual evidence proffered by Euralair that it determined was barred by the parol evidence rule. The District Court then concluded that Euralair had failed to raise any issue of material fact as to whether it had defaulted. (App. *infra* A20-27).

The District Court also rejected Euralair's argument that the assignment of the Boeing contract to GE replaced Euralair's obligation to repay the advance, finding that this assignment was only one of a number of remedies GE could choose, apparently at its discretion. (App. *infra* A17-20). Similarly, the District Court did not accept Euralair's contention that the GE advance did not have to be repaid, finding that the documents referenced by Euralair describing the rebate system did not raise an issue of material fact and could not be used as evidence because they constituted parol evidence that was inadmissible to construe an integrated agreement. (App. *infra* A20-22).

### H. The Court of Appeals Affirms the Entry of Summary Judgment in an Unpublished Summary Order.

Euralair appealed the decision to the United States Court of Appeals for the Second Circuit which, in an unpublished two paragraph summary order, affirmed the District Court's decision. The Court of Appeals, without specifying which arguments it was referring to, stated "several of plaintiffs' contentions are not properly raised on appeal as they were not argued to the district court. As for the remaining claims, we affirm substantially for the reasons stated by the district court." (App. *infra* A41-42).

## REASONS FOR GRANTING THE PETITION

In affirming the District Court's decision, the Court of Appeals, without explanation, has so far departed from the accepted and normal course of proceedings under the Federal Rules of Civil Procedure that this Court should invoke its supervisory power to rectify the errors. In refusing to even consider properly preserved arguments made by Euralair and failing to even identify what arguments it was or was not considering, the Court of Appeals sharply departed from normal procedures, thereby denying Euralair any meaningful opportunity to be heard in an appeal, effectively rendering the appeal process a nullity.

In addition, the Court of Appeals failed to follow clear precedent from this Court in sanctioning the District Court's misapplication of Federal Rule of Civil Procedure 56, granting summary judgment without allowing Euralair a legitimate opportunity to establish by evidence the existence of genuine issues of material fact. The District Court strayed from the strictures of the Federal Rules of Civil Procedure in entering summary judgment in this case based on an erroneous and unsupported interpretation of the parol evidence rule. Euralair, denied a chance to fight summary judgment, found itself subject

to a multi-million dollar judgment based on a sham transaction. The petition should be granted to overturn this improper precedent and afford Euralair an opportunity to raise genuine issues of fact.

Finally, the Petition should be granted to reaffirm the primacy of the Federal Rules of Civil Procedure and correct the District Court's clear disregard for the rules in dismissing Euralair's counterclaim. GE failed to reply to that counterclaim as provided by the rules and thereby admitted the allegations therein, allegations that established the transaction as characterized by GE was a sham. Completely ignoring these admissions and relying only on a minimal fact record, the District Court improperly dismissed the counterclaim, and the Court of Appeals sanctioned this action, disregarding direct precedent from this Court and the clear procedures laid out in the Federal Rules. This marked departure from the Federal Rules must be corrected by granting this Petition.

**POINT I – The Petition Should be Granted to Exercise This Court's Supervisory Power and Correct the Court of Appeals Departure From Accepted Practice on Appeal by Refusing to Consider Arguments on Appeal That Were Properly Presented to the District Court.**

The Petition should be granted to correct the Court of Appeals refusal to give Euralair any meaningful opportunity to make its case on appeal. The Court of Appeals apparent rejection of Euralair's arguments on preservation grounds is inconsistent with this Court's jurisprudence establishing Euralair's arguments were preserved and should have been considered. The District Court's own opinion establishes that the arguments were properly made and

preserved. Euralair's arguments would not have constituted surprise for GE or the District Court or been prejudicial to GE and should have been considered under the applicable precedents. By refusing to consider arguments, the Court of Appeals strayed from the accepted and normal course of proceedings on appeal, and in dealing with this important issue of federal law, this Court should invoke its supervisory power to correct the erroneous and damaging precedent. Supreme Court Rule 10.

### A. The Court of Appeals Denied Euralair a Meaningful Appeal by Incorrectly Concluding That Nearly All of Euralair's Arguments Were Unpreserved and Could not be Advanced on Appeal.

On appeal, Euralair's principal brief raised five main points, which were presented to the Court of Appeals as follows: 1) That GE had failed to produce sufficient evidence in its motion for summary judgment that it was the holder of the Notes at the time the lawsuit was commenced; 2) parol evidence is admissible to prove that what purported to be a loan agreement was in fact not a loan but a rebate advance that Euralair was not obligated to repay; 3) parol evidence was admissible to raise issues relating to the entire rebate arrangement between GE and Euralair; 4) GE should be estopped from electing any remedy other than accepting the assignment of the Boeing contract; and 5) the District Court erred in dismissing Euralair's affirmative defense and counterclaim for breach of the implied duty of good faith and fair dealing. In responding to Euralair's brief, GE asserted that only the last argument had been raised before the District Court, despite the clear discussion of the issues in the District Court's

opinion. The Court of Appeals apparently accepted this argument (App. *infra* A42), although it never actually identified which issues it claimed were unpreserved and it never explained why any issue was not properly preserved. In so doing, the Court of Appeals defied settled precedent from this Court and failed to follow the clear directions of this Court and the rules.

### B. Under This Court's Standards for Preservation of Error, Euralair's Arguments Were Preserved and Should Have Been Considered by the Court of Appeals.

The Court of Appeals departed from the norm in denying Euralair any opportunity to even raise clearly-preserved issues on appeal. As a general rule, an issue that was not raised before a district court cannot be raised for the first time on appeal. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994). However, as this Court has recognized, the very process of litigation often redefines and recharacterizes issues as they develop and ripen during the course of proceedings. For example, recognizing the need for some flexibility in assessing preservation issues, appellate courts generally do not require that an appellant's statement of issues on appeal be in all things identical to those raised in the district court. *See In re McLean Indus., Inc.*, 30 F.3d 385, 387 (2d Cir. 1994), *cert. denied sub nom. United States Lines Reorganization Trust v. United States*, 513 U.S. 1126 (1995).

In this case, the Court of Appeals did not demonstrate any flexibility and, in doing so, departed from the normal and accepted course of proceedings with respect to preservation of error. While in *Singleton v. Wulff*, 428 U.S.106 (1976), this Court stated that the question of what a court may

consider for the first time on appeal is primarily left to the discretion of the court of appeals based on the facts in a specific case, *Singleton*, 428 U.S. at 121, that discretion is not unfettered. For example, as this Court noted in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the traditional rule is that "once a federal claim is properly presented, a party can make any argument in support of that claim [and] parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379, *quoting Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *See also Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). In this case, the Court of Appeals abused what discretion it had when it completely excluded Euralair's arguments, denying Euralair any opportunity to have its legitimate issues considered on appeal.

In particular, the Court of Appeals erred to the extent that it excluded Euralair's arguments on the basis that the exact issues were not presented to the District Court. It is axiomatic that an argument is not considered unpreserved solely because it may be inartfully made. The Court of Appeals itself confronted a preservation issue in a recent case dealing, as this case does, with parol evidence. In *Albany Sav. Bank v. Halpin*, 117 F.3d 669 (2d Cir. 1997), the court considered the effect of a release given by a party, and while the plaintiff attempted to use parol evidence to explain what the parties intended by the release, the defendants argued against the use of the parol evidence. *Albany Savings*, 117 F.3d at 671. While the district court barred the evidence, on appeal, the plaintiff clearly articulated the argument that the parol evidence should be admissible under the exception allowing it to be used to explain ambiguous contracts. The defendants responded that in the district court, the plaintiff had failed to expressly state that the parol evidence was offered under this exception. *Albany Savings*, 117 F.3d at 671. The Court of Appeals rejected this

argument, holding that the plaintiff did sufficiently raise the ambiguity issue, although it was "no model of clarity." *Id.* In reaching this conclusion, the Court of Appeals discussed the fact that, while the plaintiff did not cite cases or articulate the exact argument with respect to an exception to the parol evidence rule, the plaintiff did urge the district court to admit the parol evidence and did highlight the pertinent facts and suggest that the language was ambiguous. The Court of Appeals therefore held that the parol evidence argument had been preserved for appeal. *Id.* Similar reasoning can be applied in this case, as Euralair clearly raised the issues in the District Court, and the Court of Appeals' inexplicably and improperly refused to consider them.

### C. The District Court's Opinion Establishes That the Arguments Were Properly Preserved.

Euralair's argument in the District Court focused primarily on the issues of using parol evidence, including the evidence in the factual affidavits submitted in its response, to explain the entire sale/rebate transaction, thereby correctly interpreting what on its surface might appear to be a loan transaction in the context of the full rebate/advance arrangement among the parties. The District Court's opinion is replete with references to the parol evidence introduced by Euralair and Euralair's efforts to use that evidence to establish issues of material fact and thereby avoid summary judgment. (App. *infra* A1-32).

### D. Consideration of Euralair's Arguments Would not Constitute Surprise for GE or the District Court, Nor Would it Prejudice GE.

Both the District Court and GE knew at all times in the litigation that Euralair was seeking to introduce parol evidence, parol evidence to interpret the contracts and agreements, and rely upon parol evidence to show that the purported "loan" was in fact no such thing. GE had clear notice of Euralair's argument and had ample opportunity to present evidence and argument on the issue. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993), *cert. denied.*, 510 U.S. 1044 (1994) (relying on absence of prejudice to district court or appellee in raising new argument). The District Court clearly did consider the parol evidence issues, which is sufficient to preserve them on appeal. Indeed, this Court has allowed appellants to raise on appeal arguments that were not raised below and were actually disavowed as long as the district court actually considered the argument. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Similarly, Euralair also raised the estoppel issue in the District Court. GE has improperly relied on labels, claiming that in the District Court, the argument was labeled promissory instead of equitable estoppel, to argue that the argument, clearly decided by the District Court in ruling that GE had a choice of remedies, was somehow not presented. (App. *infra* A23-26). Substance, and not labels, controls, in keeping with the liberal pleading standards established by the Federal Rules of Civil Procedure. *See Alexander v. Unification Church of America*, 634 F.2d 673, 678 (2d Cir. 1980). Substantively, the basic issue is unchanged – because of its promises and commitments to Euralair, was GE estopped from choosing any

remedy in the event of default other than accepting assignment of the Boeing contract? The issue was clearly presented to the District Court and clearly preserved.

The Court of Appeals should have at least exercised its discretion to review the issues on the merits in consideration of the grave consequences to Euralair stemming from the imposition of this multi-million dollar liability on this small company, subjecting it to potential financial ruination by entering summary judgment in contravention of established rules. In refusing to even identify what issues it would not consider and refusing to explain why it would not consider issues, all in direct contradiction to established procedure and precedent, the Court of Appeals put itself outside the norm and set dangerous precedent affecting the protections afforded by the appeal process. Only intervention by this Court will give Euralair its day in court and protect future litigants from similar arbitrary and unwarranted acts by a federal appellate court.

**POINT II – The Petition Should be Granted to Exercise This Court's Supervisory Power by Correcting the Court of Appeals' Departure From the Normal Course of Procedures Regarding Summary Judgment in Refusing to Grant Euralair a Meaningful Opportunity to Present Evidence Barring Summary Judgment.**

This Court should exercise its supervisory power to correct the Court of Appeals' departure from accepted practice in affirming the entry of summary judgment in this matter. The District Court denied Euralair the protections required to be afforded a party responding to a motion for summary judgment under Federal Rule of Civil Procedure 56, by

improperly invoking the parol evidence rule to forbid Euralair from presenting evidence establishing the existence of genuine issues of material fact. In improperly interpreting and applying the rule, the District Court foreordained the result in this case -- a multi-million dollar judgment imposed on Euralair without a trial and in contravention of the spirit and letter of the Federal Rules.

### A. Summary Judgment Should Not be Granted Where Genuine Issues of Material Fact Exist.

Summary judgment is not be "used to deprive a litigant of a full trial of genuine fact issues." 10A Wright & Miller, *Federal Practice and Procedure 2d* § 2712 (1998). In an early decision interpreting the summary judgment rule, the Fifth Circuit opined that

> summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

*Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940). This Court, in its more recent decisions interpreting the rule, has explained that summary judgment is not a substitute for trial. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge, whether he is ruling on a motion for summary judgment or a motion for directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party responding to a motion for summary judgment must be given a meaningful opportunity to respond and combat the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (Rule 56 must be construed with due regard for party bring motion and for the rights of persons asserting defenses "adequately based in fact to have those claims and defenses tried to a jury").

In this case, it is undisputed that evidence establishing the existence of material fact issue was presented. The District Court refused to consider that evidence, in contravention of clear precedent and to the marked detriment of Euralair.

### B. The District Court Incorrectly Interpreted the Parol Evidence Rule in Denying Euralair a Meaningful Opportunity to Establish the Existence of Genuine Issues of Material Fact.

The District Court's interpretation and application of the parol evidence rule was improper and unsupported. A basic common law principle, the parol evidence rule generally bars the introduction of evidence extraneous to a written agreement for the purpose of contradicting the terms of that agreement. *See Cruzan v. Director*, 497 U.S. 261, 284 (1989); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 467 (1985). Under New York law, which governs the agreements between the parties in this case (App. *infra* A6 n.4), there are a

number of exceptions to the parol evidence rule applicable here.

Exceptions to the parol evidence rule are generally grouped into two categories. As the New York Court of Appeals has long held, the first category of exceptions "includes those cases in which parol evidence has been received to show that which purports to be a written contract is in fact no contract at all." *Thomas v. Scutt*, 127 N.Y. 133, 27 N.E. 961, 962 (1891); *Val-Ford Realty Corp. v. J.Z.'s Toy World, Inc.*, 231 A.D.2d 434, 647 N.Y.S.2d 488, 489 (1st Dep't 1996). Under this exception, a party may use parol evidence "not to contradict or vary [the terms of an instrument] but to destroy a written instrument." *Thomas*, 27 N.E. at 962. In this case, the applicable exception allows parol evidence to be used to demonstrate that what appears to be an unambiguous contract was not in fact intended to be binding.

Parol evidence may also be used to prove the existence of agreements collateral to the written agreement. *See Marinelli v. Unisa Holdings, Inc.*, 238 A.D.2d 118, 119, 655 N.Y.S.2d 495, 496 (1st Dep't 1997) (parol evidence of oral agreement may be received if it is collateral to written agreement, does not contradict written agreement, and concerns something that parties would not ordinarily be expected to embody in written agreement), *citing Mitchell v. Lath*, 247 N.Y. 377, 381-82, 196 N.E. 402 (1928); *see generally Ball v. Grady*, 267 N.Y. 470, 196 N.E. 402 (1935). *See* discussion *infra* Point IV.

The Court of Appeals and the District Court erred and as a result denied Euralair an opportunity to establish material fact issues and defeat summary judgment by ignoring clear New York precedent allowing a party to use parol

evidence to prove that the written agreement was not intended by the parties to create any enforceable obligations. *See Dayan v. Yurkowski*, 238 A.D.2d 541, 541, 656 N.Y.S.2d 689, 690 (2d Dep't 1997) (parol evidence admissible to show that a writing purporting to be a contract is no contract at all), *citing Val-Ford Realty*, 231 A.D.2d at 435; *Greenleaf v. Lachman*, 216 A.D.2d 65, 66, 628 N.Y.S.2d 268, 269 (1st Dep't 1995) (applying exception to parol evidence rule to nullify contract); *Adirondack Bank v. Simmons*, 210 A.D.2d 651, 653, 619 N.Y.S.2d 383 (3d Dep't 1994) (parol evidence admissible to "destroy the written instrument"), *citing* 58 N.Y.Jur.2d, Evidence and Witnesses, § 609, at 239; *Paolangeli v. Cowles*, 208 A.D.2d 1174, 1175, 617 N.Y.S.2d 936, 937-38 (3d Dep't 1994) (parol evidence rule does not bar admission of evidence showing purported agreement was never intended to be binding obligation), *citing* Richardson, Evidence § 607, at 602 (Prince 10th ed.), *Bernstein v. Kritzer*, 253 NY 410, 416, 171 N.E. 690 (1930).

### C. Evidence Proffered by Euralair Establishes the Existence of Genuine Issues of Material Fact.

The evidence submitted by Euralair to the District Court, including the various pieces of correspondence, should have been considered to determine whether they created an issue of material fact with respect to whether the written agreements were actually intended to create any enforceable obligations at all. The documents demonstrate that the parties never intended for Euralair to obtain a $10 million loan, guaranteed by GE, but in fact the GE was giving Euralair a $25 million incentive package to lure Euralair into using GE engines on the Boeing jets it had ordered. Euralair proffered evidence that GE understood that Euralair had no funds with which to repay any purported loan, that the "loan" was in fact an advance

on a rebate program, and that Euralair understood that if the deal did not go through, GE could take back the engines and be assigned the Boeing contract. (App. *infra* A17-20, 23-24). This evidence establishes the existence of issues of material fact regarding whether the transaction was a loan from ACMT to be guaranteed by GE or an effort by GE to get a foreign company to use its engines by giving that company, Euralair, more than $20 million in incentives.

This evidence is confirmed by GE's own admission, by its failure to respond to Euralair's counterclaim, that the so-called loan transaction was a sham. *See infra* Point IV. The District Court's refusal to acknowledge that judicial admission, coupled with its refusal to even consider evidence supporting that admission, is completely inconsistent with the protections afforded the responding party under Rule 56.

The errors of the District Court and the Court of Appeals deprived Euralair or any legitimate opportunity to defend itself, and Euralair was thereby denied the procedural safeguards afforded by the Federal Rules and this Court's precedents. While the procedure of summary judgment itself, when properly followed, does not implicate due process or violate any Seventh Amendment right to trial by jury, *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (where there are no properly controverted factual issues, no jury trial is required), because the District Court misapplied the rules, the Court of Appeals sanctioned the misapplication, and it is clear that issues of material fact did exist, Euralair did not receive a full and fair opportunity to defend itself in violation of its due process rights. *See Detenber v. American Universal Insurance Co.*, 389 U.S. 987 (1967) (Black, J., dissenting) (dissenting from denial of certiorari because improper entry of summary judgment violated Seventh Amendment right to trial

by jury); *cf. Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982) (party has property interest to be protected by due process in right to use procedures set up by government to adjudicated disputes);

This Court's intervention in its supervisory role is crucial. As commentators have noted, "summary judgment must be used with a due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues." 10A Wright & Miller, *Federal Practice and Procedure 2d* § 2712 (1998). This Court's carefully crafted summary judgment jurisprudence, as set out in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) is adversely affected impacted by this improper use of a state parol evidence rule to bar a party, Euralair, from proffering evidence defeating summary judgment. To protect the integrity of summary judgment jurisprudence and allow Euralair its rightful day in court, the Petition should be granted.

**POINT III – The Petition Should be Granted to Exercise This Court's Supervisory Power to Correct the Court of Appeals's Refusal to Allow Euralair to Present Parol Evidence Regarding GE's Agreement to Take Assignment of the Boeing Contract in Satisfaction of the Advance.**

The Petition should also be granted to invoke this Court's supervisory power to correct the sharp departure from the norm of the Court of Appeals decision to bar evidence establishing that GE, in the event of a default, agreed to accept assignment of the Boeing contract in full satisfaction of the

advance. Under applicable New York law, the parol evidence rule does not bar parol evidence where the written agreements at issue are incomplete. Here, it is undisputed that the agreements at the heart of GE's complaint against Euralair are incomplete and evidence of extrinsic agreements should not have been barred. By again erroneously invoking the parol evidence rule, the District Court, as sanctioned by the Court of Appeals, denied Euralair any meaningful opportunity under Federal Rule of Civil Procedure 56 to establish the existence of genuine issues of material fact regarding GE's choice of remedies. GE's admission that the transaction as presented to the Court was a sham confirms the severity of the error created by the District Court's failure to follow the accepted procedures. This Court's intervention is necessary to safeguard proper use of the summary judgment procedures and protect parties such as Euralair from similar gross violations of due process and the imposition of huge damages awards without an opportunity to raise issue of fact or present a case to a trier of fact.

### A. The Parol Evidence Rule Does Not Bar Evidence Where the Written Agreement is Incomplete.

The District Court, and the Court of Appeals that affirmed its opinion, improperly interpreted New York law to deny Euralair the chance to establish that GE elected the assignment remedy to the exclusion of other remedies, including this lawsuit. Under New York law, parol evidence may be admitted even where a written agreement exists when the agreement is incomplete and the parol evidence would "complete the entire agreement of which the writing was only a part." *Thomas v. Scutt*, 127 N.Y. 133, 27 N.E. 961, 962-63 (1891). Clear precedent establishes that extrinsic materials can

be used where the parties intended those materials, and the agreements they evidence, to be part of the overall agreement. *Hallmark Synthetics Corp. v. Sumitomo Shoji New York, Inc.*, 26 A.D.2d 481, 484, 275 N.Y.S.2d 587, 590 (1st Dep't 1966) (extrinsic materials relevant where "it appears they were intended to be part of the contract") (citations omitted).

To fall within this exception to the parol evidence rule, the contract between the parties must not appear to embrace all of the details of the agreement so as to "express the whole arrangement between the parties." *Jamestown Business College Associates, Ltd. v. Allen*, 172 N.Y. 291, 64 N.E. 952, 953 (1902). In addition, any extrinsic material proffered must not expressly contradict the terms of the written instrument. *Id.* Under this exception, often called the collateral promise exception, parol evidence has long been held admissible to establish the existence of collateral or side agreements. *See, e.g. Chapin v. Dobson*, 78 N.Y. 74, 81-82 (1879) (oral guarantee, which did not expressly contradict written contract, was admissible).

Whether or not an agreement is complete for purposes of this exception may be established by looking to the incompleteness of the writings and the negotiations that led up to the preparation of the writings. *See Farmer v. Arabian American Oil Co.*, 277 F.2d 46, 40 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960). For example, an agreement may not be considered complete where it is silent as to a fundamental obligation of one of the parties. *See Belknap v. Dean Witter & Co.*, 92 A.D.2d 515, 460 N.Y.S.2d 1005, 1007 (1st Dep't 1983), *aff'd*, 61 N.Y.2d 802, 462 N.E.2d 125 (1984). With such a partially integrated agreement, parol evidence, while it still may not be used to contradict written terms, may be used supplement the written terms and add additional elements to the

agreement. *See Laskey v. Rubel Corp.*, 303 N.Y. 69, 100 N.E.2d 140, 141 (1951).

### B. The Agreements Relied on the District Court Were Incomplete, and the District Court Erred in Excluding Parol Evidence.

The financing agreements that form the basis of GE's claim were clearly incomplete, as the $10 million advance was only part of a larger incentive deal involving more than $20 million. (App. *infra* A3-9). In effect, more than half of what the parties had agreed to was not even mentioned in the papers presented to the District Court and the Court of Appeals by GE. The parties negotiated a package worth more than $20 million, not the truncated $10 million "loan" upon which GE makes its claims. The District Court did not follow clear New York precedent when it refused to consider evidence of an additional agreement, beyond the only partially integrated specific written documents, that GE had agreed to accept the assignment.

The District Court and the Court of Appeals also erred to the extent that they relied on the integration clause in the Reimbursement Agreement to bar parol evidence. (App. *infra* A21-22). In interpreting New York law, the Court of Appeals itself has held that such a clause is not controlling. *Hellenic Lines Ltd. v. Gulf Oil Corp.*, 340 F.2d 398, 401 (2d Cir. 1964) (parol evidence not barred where written contract "was not a complete statement of the agreement by the parties, in spite of the integration clause."); *see also Policastro v. Town of LaGrange*, 193 A.D.2d 950, 597 N.Y.S.2d 794, 796 (3d Dep't 1993) (merger and integration clause may be disregarded where parties manifested intent to have agreement provisions survive memorialization). Even where an integration clause is

present, under New York law, the issue of the intent of the parties, as evidenced both by the writing and the parol evidence of additional agreements, is best left to the trier of fact and should not be cavalierly decided on summary judgment. *See The Sixty-Five Security Plan v. Blue Cross and Blue Shield of Greater New York*, 583 F. Supp. 380, 390 (S.D.N.Y. 1984) (evidence of party's reliance on collateral oral agreement should be considered even where there is an integration clause, and parties' understanding of the contract should be left to the trier of fact).

The agreements presented to the District Court and the Court of Appeals were clearly not the complete memorialization of the incentive deal. In addition, GE made judicial admissions by failing to reply to Euralair's counterclaim that confirm the transaction actually involved much more than the information committed to paper and presented in Court. GE's agreement to accept assignment of the Boeing contract in the event of default does not in any way contradict the express terms of the written documentation, and GE has admitted that the documents do not memorialize the entire deal between the parties. The petition should be granted to establish that proper procedures must be followed in evaluating summary judgment motions and parties responding to motions must be afforded a meaningful opportunity to establish the existence of fact issues sufficient to defeat summary judgment.

**POINT IV - The Petition Should be Granted to Exercise This Court's Supervisory Power Over the Lower Courts and the Federal Rules of Civil Procedure By Correcting the Court of Appeals' Erroneous Sanctioning of the District Court's Dismissal of the Counterclaim Contrary to Federal Rule of Civil Procedure 8.**

The Court of Appeals ignored settled law and procedure in affirming the dismissal of Euralair's counterclaim based on the implied duty of good faith and fair dealing under New York Law. The District Court improperly dismissed these claims even though GE did not answer or otherwise respond to the counterclaim within the time frame established by the Federal Rules of Civil Procedure. This Court should exercise its supervisory power over the lower courts and over the Federal Rules of Civil Procedure and grant the petition to correct the District Court's dismissal of a claim when no proper responsive pleading had been filed and GE thereby made judicial admissions of facts sufficient to give rise to a cause of action.

The Federal Rules of Civil Procedure make it clear that a party served with a counterclaim "denominated as such" must file a responsive pleading, and failure to do so will result in a default. Fed. R. Civ. P. 55(d). "Since a counterclaim is basically a defendant's complaint, it is perfectly logical to oblige a plaintiff to respond to it." 5 Wright & Miller, *Federal Practice and Procedure 2d* § 1184 (1990). Generally, a reply to a counterclaim or other proper response (e.g. motion to dismiss) must be filed within twenty days after service of the counterclaim.

The consequences of failing to respond to a counterclaim are meant to be harsh. Failure to reply to a counterclaim "acts as an admission of its allegations under Rule 8(d)." 5 Wright & Miller, *Federal Practice and Procedure 2d* § 1184 (1990); *see also* Fed. R. Civ. P. 8(d); *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980). Indeed, as commentators have pointed out, "to avoid the effect of the first sentence of Rule 8(d), a pleader must do more than make a passing reference to the allegations in the preceding pleading or interpose an ambiguous response to them . . . a denial must meet the substance of the averments denied; otherwise it will be treated as an admission under Rule 8(d)." 5 Wright & Miller, *Federal Practice and Procedure 2d* § 1279 (1990).

It is undisputed that Euralair filed a counterclaim clearly identified as such alleging that the transaction involved much more than the purported "loan" GE had represented to the Court and that GE violated the implied covenant of good faith and fair dealing attendant to the agreements between the parties. (App. *infra* A27-31). Under New York law, implicit in all contracts subject to that state's law is an implied covenant of fair dealing and good faith. *Components Direct, Inc. v. European American Bank and Trust Co.*, 175 A.D.2d 227, 572 N.Y.S.2d 359, 361 (2d Dep't 1991). As the Court of Appeals itself stated in another case, "this covenant includes 'an implied undertaking on the part of each party that he will not intentionally and purposefully do anything to prevent the other party from carrying out the agreement on his part." *Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228, 230 (2d Cir. 1991). GE did not answer or otherwise respond to this claim within the time period set out in the Federal Rules of Civil Procedure.

Instead of following the direction of Rule 8 and concluding that GE had admitted the allegations in Euralair's counterclaim regarding the details of the transaction and GE's breach of the duty of good faith and fair dealing, the District Court simply dismissed the counterclaim, apparently based on GE's untimely motion to dismiss. The Court of Appeals sanctioned this violation of due process and departure from the accepted and usual course of proceedings prescribed by the Federal Rules. Euralair's counterclaim should not have been dismissed, GE's judicial admissions should have been used against it, and this departure from procedure presents an important issue of federal law justifying invocation of this Court's supervisory power over the lower courts and over the rules themselves by granting this Petition.

## CONCLUSION

The questions presented in this Petition are important questions of law involving this Court's supervisory power over the lower courts and the federal rules. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| GENERAL ELECTRIC COMPANY, | : | |
| | : | |
| Plaintiff, | : | |
| v. | : | OPINION & ORDER |
| | : | 96 Civ. 884(SAS) |
| COMPAGNIE EURALAIR, S.A., | : | |
| | : | |
| Defendant, | : | |

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. Introduction

This is a contract dispute arising out of agreements between Plaintiff General Electric Company ("GE") and Defendant Compagnie Euralair, S.A. ("Euralair"). GE is a New York corporation whose business includes the manufacture of aircraft engines. Affidavit of Aaron Marcu, Attorney for Plaintiff ("Marcu Aff."), Ex. 2 (Complaint) ¶ 6. Euralair, a French corporation, is engaged in the commercial airline business. Marcu Aff., Ex. 4 (Answer) ¶ 1. GE's complaint states two causes of action, each alleging a breach by Euralair of one of the agreements structuring the sale to Euralair of GE jet engines. Euralair answered the complaint, asserted an affirmative defense of promissory estoppel, and counterclaimed for breach of the covenant of

good faith and fair dealing. GE has moved for summary judgment and for dismissal of the counterclaim.

II. Standard for Summary Judgment

A party is entitled to summary judgment when there is "no genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 4317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden of demonstrating the absence of a material factual dispute rests on the moving party. See Gallo v. Prudential Residential Services, Ltd., 22 F. 3d 1219, 1223 (2d Cir. 1994). However, the non-moving party must present "significant probative supporting evidence" that a factual dispute exists. Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 249. The opposing party may not rely on unsupported denials or allegations. Anderson, 477 U.S. at 256.

For purposes of summary judgment, the court's role is to determine whether issues exist to be tried, not to try issues of fact. See Balderman v. United States Veterans Admin., 879 F.2d 57, 60 (2d Cir. 1989); Donahue v. Windsor Locks Bd. Of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987). All ambiguities must be resolved and all inferences

drawn in favor of the party against whom summary judgment is sought. See Anderson, 477 U.S. at 255; Donahue, 834 F.2d at 57, 60. If there is evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper. Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994).

Furthermore, in contract actions, "summary judgment is appropriate where the language of the contract is unambiguous, and reasonable persons could not differ as to its meaning." United States v. 0.35 of an Acre of Land, 706 F. Supp. 1064, 1070 (S.D.N.Y. 1988). A court may not draw any inference or give any construction to the terms of a written contract that "may be in conflict with the clearly expressed language of the written agreement." Id.

III. Facts

In December 1990, Euralair agreed to buy from Boeing two Boeing 777 airplanes, each equipped with two jet engines. Defendant's Statement Pursuant to Local Civil Rule 3(g) ("Def. 3(g)") ¶ 1.[1] After

[1] In its 3(g) Statement, GE states that December 1992 was the date of both the agreement between Euralair and Boeing and the agreements between Euralair and GE. See Plaintiff's Statement Pursuant

a competition among three manufacturers, Euralair selected GE to manufacture the engines that would be placed in the two Boeing planes. Defendant's Memorandum in Opposition to Summary Judgment and Dismissal of Defendant's Counterclaim ("Def. Mem.") at 4; Def. 3(g) ¶ 1(a). Further, Euralair agreed to place an order with GE for a spare engine by a certain date. Pl. 3(g) ¶1; Def. 3(g) ¶1(a).

A. Structure of Purchase/Advance

Euralair's purchase of the engines was effected through a series of financing agreements. GE agreed to give Euralair a $20 million rebate on the price of the engines and to arrange for Euralair to receive a payment of $10 million of the rebate (also called an Introductory Allowance).[2]

2. According to GE, the $10 million Introductory Allowance was

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to Local Civil Rule 3(g) ("Pl. 3(g)") ¶ 1. The Court assumes that GE meant to say that while the Euralair/Boeing agreement was made in 1990, the Euralair/GE agreements dated from 1992. See Affidavit of Rolande Cutner, Attorney for Euralair ("Cutner Aff."), Ex.1.

[2]The parties disagree over whether GE agreed to give Euralair the rebate "in connection with" the agreements for Euralair to buy planes from Boeing and for Euralair to order a spare engine form GE. See Pl. 3(g) ¶ 2; Def. 3(g) ¶ 2. Euralair contends that GE agreed to provide a rebate because GE was determined to have Euralair select GE's engine over that of its competitors. Def. 3(g) ¶ 2

structured in the following manner: (1) Euralair issued notes in the amount of $10 million (the "Notes") and sold the Notes to Automated Cash Management Trust (ACMT), an institutional investor; (2) GE guaranteed Euralair's repayment of the Notes; and (3) Euralair indemnified GE's guarantee obligations. Pl. 3(g) ¶ 4. On December 22, 1992, GE, Euralair and ACMT executed the financing agreements, which GE attached as exhibits to the complaint. P. 3 (g) ¶ 5.[3] Euralair does not directly dispute this characterization of the transaction, but states that the financing agreements attached to the complaint "do not reflect the actual nature of the discussion entertained between GE and Euralair during the year 1992." Def. 3(g) ¶ 4.

B. Relevant Financing Agreements

The financing agreements attached to the complaint consist of the following: Note Purchase Agreement (Cplt. Ex. A), made between

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[3]Euralair purports to dispute this allegation (see Def. 3(g) ¶ 5). However, Euralair does not deny that the agreements exist. Euralair simply disputes the relevance of the agreements. Because the agreements are attached to the complaint, the Court can see for itself that the agreements exist, and that they were signed by certain parties (including Euralair, which signed the Note Purchase Agreement (Ex. A), the Notes (Ex. B), and the Reimbursement Agreement (Ex. D.)). The relevance of a document is not a fact which can be disputed.

Euralair and ACMT; Notes (Cplt. Ex. B), made between Euralair and the Noteholder (ACMT at time of making); Guaranty Agreement (Cplt. Ex. C), made between GE and ACMT; Reimbursement Agreement (Cplt. Ex. D), made between GE and Euralair; and the Administrative Agreement (Cplt. Ex. E), made among GE, ACMT, and Pittsburgh National Bank. All of the agreements are dated December 22, 1992.[4]

Several other agreements are relevant to the dispute between GE and Euralair. First, a Security Agreement was also executed by GE and Euralair on December 22, 1992 (see Second Marcu Aff., dated May 8, 1996, Ex. 1). According to GE, this agreement represents GE's acceptance, as collateral and in "connection with guaranteeing the $10 million loan to Euralair," of a security interest in Euralair's contract with Boeing for the two 777 jet airplanes. Pl. Reply Mem. at 4. Second, GE and Euralair entered into Letter Agreement No. 2, dated December 16, 1992 (see Second Marcu Aff., Ex. 2; Cutner Aff., Ex. 3). This letter agreement consists of a three-page commitment letter and two attachments. GE contends that this letter agreement was entered

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[4]Each of these agreements contains a "governing law" provision designating New York law as controlling.

into in anticipation of the detailed financing agreements that followed six days later. P. Reply Mem. at 5.

C. Key Provisions of the Agreements

Under the Reimbursement Agreement, "[e]ach of the following acts, occurrences or conditions before the Final Maturity Date shall constitute an 'Event of Prepayment': (b) The failure by [Euralair] to place a firm and unconditional order with [GE] not later than April 30, 1995 for one new GE90-B4 spare aircraft engine . . ."[5] Cplt. Ex. D, § 6.1 (b). Further, "[i]f an Event of Prepayment has occurred, [GE] may, in its sole discretion, instruct [Euralair] to exercise its right to prepay all or any portion of the outstanding principal of the Notes . . ." Id. § 6.2. If Euralair "shall fail to perform or observe any of its agreements, covenants or obligations arising under this" agreement, such failure shall "constitute an 'Event of Default'" under the Reimbursement Agreement. Id. § 7.1(b)(I).

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[5]Despite Euralair's signature (through Alex Couvelaire, its President) on the Reimbursement Agreement, Euralair now disputes that it was required to order a spare GE engine by April 30, 1995. Rather, because the date of delivery of the two Boeing 777 planes was changed from April and May 1997 to October and November 1998, Euralair contends that the deadline for ordering a spare engine changed accordingly. This contention is addressed in Part IV. A., infra.

Pursuant to the Note Purchase Agreement, "ACMT agreed to pay Euralair $10 million for the Notes, and Euralair agreed to repay that amount by May 31, 1997." Def. Mem. at 13 (citing Cplt. Ex. A, ¶ 1.1; Cplt. Ex. B, ¶ 1); Pl. Reply Mem. at 2. One of the events constituting an "Event of Default" under the Note Purchase Agreement is that the "Noteholder shall have received written notice from [GE] that an Event of Default has occurred and is continuing under the Reimbursement Agreement." Cplt. Ex. A, § 9.1(f).

Under the Guaranty Agreement, GE guaranteed Euralair's obligation to pay the principal and post-maturity interest on the Notes, plus certain taxes. Cplt. Ex. C, §§ 1, 2(a); Pl. Mem. at 4. The Guaranty Agreement also provides that GE may fulfill its obligations as guarantor by purchasing the Notes from ACMT upon an Event of Default under the Note Purchase Agreement: "[u]pon the occurrence and during the continuance of any Event of Default [under the Note Purchase Agreement], [GE] shall have the right, but shall not obligated to: (ii) purchase the then outstanding principal amount of the Guaranteed Notes from the Noteholder. . . ." Cplt. Ex. C, § 3(b)(ii).

Finally, the Reimbursement Agreement provides that "[i]n the

event that [GE] makes any payment under the Guaranty Agreement in respect of principal of the notes, [Euralair] shall, immediately upon demand by [GE], reimburse [GE] for such payment, together with interest thereon . . ." Cplt. Ex. D, ¶ 2.1.

D. Events after 1992

According to GE, the following events occurred after GE and Euralair entered into the above-described financing agreements. In its 3(g) Statement, Euralair purports to deny these allegations by GE. However, Euralair, does not really dispute that the events occurred. Rather, Euralair either disagrees with the relevance of the events or seeks to explain why the events were justified or do not constitute an act of default. Accordingly, I will first describe the events as related (and evidenced) by GE, and will then address whether the actions constitute an act of default.

Euralair did not order a spare GE engine, either before or since April 30, 1995. P. 3(g) ¶ 15. By letter dated August 21, 1995, GE issued a Prepayment Instruction to Euralair, pursuant to § 6.2 of the Reimbursement Agreement. Id. ¶ 16. This letter informed Euralair that "unless Euralair agreed to a restructuring of the financing arrangement,

Euralair was required to prepay the entire outstanding principal of the Notes by" September 8, 1995. Id.; see also Cplt. Ex. F. Euralair did not follow the Prepayment Instruction or otherwise agree to a restructuring. Pl. 3(g) ¶ 21; Cplt. Ex. G.

According to GE, this written notice to ACMT triggered "both automatic acceleration of the Notes under the Note Purchase Agreement and GE's obligations under the Guaranty Agreement to pay the outstanding principal of the Notes or to purchase the Notes from ACMT." Pl. 3(g) ¶ 22 (citing Cplt. Ex. A. §§ 9.1 (f), 9.2 (a); Cplt. Ex. B at 2; Cplt. Ex. C §§ 2(a), 3(b)). GE purchased the Notes from ACMT on January 29, 1996. Pl. 3(g) ¶ 23; Cplt. Ex. H. GE then demanded, by letter dated January 30, 1996, that Euralair "immediately reimburse GE for the principal amount of the Notes and interest accrued thereon as well as for all costs, fees, liabilities, losses and expenses incurred by GE in connection with Euralair's defaults." Pl. 3(g) ¶ 25; Cplt. Ex. I. Euralair admits that it did not comply with GE's payment demands. Def. 3(g) ¶ 26; Pl. 3(g) ¶ 26.

GE now seeks repayment of the $10 million advance, plus interest (at the rates specified in the financing agreements), expenses

and attorneys' fees. In its counterclaim, Euralair seeks dismissal of the complaint and judgment in the amount of $20 million plus interest, costs and disbursements.

IV. Discussion

Euralair presents three arguments against granting summary judgment in favor of GE.

A. Euralair is Not in Default

1. Arguments

First, Euralair argues that it is not in default of the Note Purchase Agreement or the Reimbursement Agreement. Euralair admits that it did not order a spare GE engine by April 30, 1995. Answer ¶¶ 17-18. GE alleges that this failure to order is an Event of Prepayment under the Reimbursement Agreement, and Euralair acknowledges that the Reimbursement Agreement "specifies certain circumstances under which GE may instruct Euralair to prepay the Notes." Def. Mem. at 14 (citing Cplt. Ex. D, ¶ 6). However, Euralair contends that the failure to order a spare engine by that date is not an Event of Prepayment.

Euralair points to the purchase agreement between Boeing and Euralair, which provided that the two Boeing 777 airplanes would be

delivered to Euralair in April and May, 1997. See Cutner Aff., Ex. 1 § 2.1. Next, Euralair points to Letter Agreement No. 2 between GE and Euralair, which states that "Euralair agrees to place a firm and unconditional purchase order with GE, at least twenty-four (24) months prior to delivery of the first of the above two (2) 777-B aircraft, for a minimum quantity of one (1) spare new GE90-B4 Engine in support of such two aircraft . . ." Cutner Aff., Ex. 3; Second Marcu Aff., Ex. 2 (emphasis added). Finally, Euralair states that it could not proceed with the spare engine order because its contract with the "large French government-owned commercial airline" was not renewed in April 1995. Def. Mem. at 14. Consequently, Boeing agreed to delay until October and November 1998 the delivery of the two airplanes Euralair had agreed to buy. Cutner Aff., Exs. 11, 21.

Euralair argues that the provision of Letter Agreement No. 2 requiring it to order a spare engine at least 24 months before delivery of the first Boeing airplane signifies that the order deadline was floating. Under this theory, when the expected delivery date of the airplanes was moved back, Euralair's deadline for ordering a spare GE engine moved back as well. See Def. 3(g) ¶ 15; Def. Mem. at 14-15.

GE replies that Euralair's theory overlooks certain portions of Letter Agreement No. 2. The letter agreement states that the "terms of advancement of the US $10,000,000" introductory allowance "are outlined in Attachment A to this Letter Agreement No. 2." Second Marcu Aff., Ex. 2 at 2. Attachment A states, in part, that:

> GE intends to provide the funds for any advance of that Introductory Allowance by unconditionally guaranteeing, to financial institutions selected by GE, the principal and accrued interest of notes issued by Euralair in accordance with the terms of this agreement. GE's obligation to furnish its guarantee is conditioned upon the preparation, negotiation, execution and delivery of definitive documentation pertaining thereto containing such provisions as GE and its legal counsel deem appropriate in their sole discretion.

Second Marcu Aff., Ex. 2, Attachment A at 1. According to GE, this reference to "definitive documentation" contemplates the financing agreements entered into six days later, including the Reimbursement Agreement, under which Euralair was required "to place a firm an unconditional order with [GE] not later than April 30, 1995 for one new GE90-B4 spare aircraft engine . . ." Pl. Reply Mem. at 7; Cplt. Ex. D, § 6.1(b).

2. Analysis

Euralair's argument suggests that the Court must determine whether the two agreements are in conflict. "Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement." Williams v. Mobil Oil Corp., 83 A.D. 2d 434, 439 (2d Dep't 1981) ( citing Rudman v. Cowles Communications, Inc., 30 N.Y. 2d 1, 13 (1972)). Therefore, I shall construe Letter Agreement No. 2 and the Reimbursement Agreement as one agreement. According to other general rules of contract construction, the preferred "interpretation of an instrument . . . avoids inconsistencies and gives meaning to all of its terms." Bed 'N' Bath of Spring Valley, Inc. v. Spring Valley Partnership, 185 A.D. 2d 584, 587 (3d Dep't 1992); see also Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 247 (1955) ("'[t]hat interpretation is favored which will make every part of a contract effective'") (citing Fleischman v. Fergueson, 223 N.Y. 235, 239 (1918)). "[W]here there is an apparent repugnancy between two clauses of a contract, the court has the duty to reconcile them, if possible." People v. Stokes, 165 Misc. 2d 934, 937 (Sup. Ct. Monroe Co. 1995) (citing Hudson-Port Ewen Assoc., L.P. v. Chien Kuo, 165

A.D. 2d 301, 303-304 (3d Dep't), aff'd, 78 N.Y. 2d (1991)). Further, "where there are general and specific provision relating to the same matter, the special provisions control, even if there is an inconsistency." Id. At 938 (citing Lewiston-Porter Central School District v. Sobol, 154 A.D. 2d 777, 779 (3d Dep't 1989), appeal dismissed, 75 N.Y. 2d 978 (1990)). According to these principles, the contract in the instant case must be interpreted in favor of the specific provision (that the order deadline was April 30, 1995) rather than the more general provision (that the order deadline was 24 months before delivery of the first Boeing plane).[6]

In sum, the financing agreements provide that, unless Euralair placed a firm order for a spare GE engine by April 30, 1995, GE could issue a Prepayment Instruction to Euralair, instructing Euralair to repay the $10 million advance from GE. The term in Letter Agreement No.

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[6]In any event, I need not decide whether the Reimbursement Agreement conflicts with Letter Agreement No. 2. The letter agreement cannot be a modification of the Reimbursement Agreement, because Letter Agreement No. 2 predates the other financing agreements by six days. Further, Euralair does not dispute the terms of the Reimbursement Agreement (see Answer ¶ 7; Def. 3(g) ¶ 3), and does not dispute that it ignored GE's Prepayment Instruction (see Def. Mem. at 15). Therefore, the undisputed facts show that Euralair has breached the Reimbursement Agreement.

2 requiring an order 24 months prior to delivery does not negate the more specific term in the Reimbursement Agreement. Euralair admittedly failed to order the spare engine by the April 30, 1995 deadline. Euralair does not contend that any modification was made to the Reimbursement Agreement, which was executed six days after Letter Agreement No. 2. Therefore, as alleged by GE, Euralair was in default of the Reimbursement Agreement as of September 8, 1995, when the deadline for complying with GE's August 21, 1995 Prepayment Instruction passed. See Pl. 3 (g) ¶¶ 17-20; Cplt. Ex. D, § 7.1 (b)(I). Further, Euralair was in default of the Note Purchase Agreement as of January 29, 1996, when GE provided written notice to ACMT that an Event of Default had occurred and was continuing under the Reimbursement Agreement. See Pl. 3(g) ¶¶ 21-22; Cplt. Ex. A, § 9.1(f). Euralair has failed to raise a genuine issue of material fact as to whether it defaulted on these Agreements.[7]

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[7]Euralair also suggests that GE issued the Prepayment Instruction in bad faith by "direct[ly] contradicting] . . . the terms of [GE's] General Agreement with Euralair." Def. Mem. at 15. However, Euralair cites no portion of the "General Agreement" (which is distinct from all of the above-mentioned agreements) in support of this contention. Euralair also argues that Sections 6.2 and 6.3 of the Reimbursement Agreement, which vest in GE sole discretion to issue a

B. Euralair's Assignment of Boeing Contract to GE Replaced Euralair's Obligation to Repay the Advance

Euralair's next argument focuses on GE's acquisition of a security interest in Euralair's contract with Boeing for the two 777 jet airplanes. Euralair suggests that this assignment took the place of any obligation by Euralair to reimburse GE for the Introductory Allowance. That is, Euralair would not have to reimburse the money paid by GE to Euralair, "because in taking the place of Euralair, GE would be handsomely compensated by Boeing." Def. Mem. at 10. "[I]f Euralair . . . failed to order the GE engine 90-B4, GE would assume the responsibilities of Euralair and take over the contract with Boeing . . . GE would receive early delivery of the two 777 aircraft." Id.

Euralair essentially argues that the "alternative rights GE has under a Security Agreement between the parties somehow deprived GE of its primary rights under the Reimbursement and Note Purchase Agreements." Pl. Reply Mem. at 3. However, an examination of the Security Agreement reveals otherwise. As stated earlier, through the

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Prepayment Instruction, represent bad faith by GE. Def. Mem. At 15. Euralair's claim that the existence of certain provisions in an agreement represent bad faith by one of the signatories is difficult to sustain given that Euralair itself signed the agreement.



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Security Agreement, GE accepted as collateral a security interest in Euralair's contract with Boeing. The agreement was negotiated on Euralair's behalf by United States and French counsel (see Marcu Aff., Ex. 1), and Euralair does not allege that either counsel was incompetent. Section 5.5 of the Security Agreement, entitled "Remedies Cumulative," states that

> Each and every right, power and remedy hereby specifically given to [GE] shall be in addition to every other right, power and remedy specifically given under this Security Agreement or under the other Financing Documents . . . and each and every right. . . may be exercised from time to time or simultaneously and as often and in such order as may be deemed expedient by [GE].

The term "Financing Documents" includes the Reimbursement Agreement, the Notes, the Note Purchase Agreement, the Guaranty Agreement, and the Security Agreement. See Cplt. Ex. D, § 1. Thus by terms of the Security Agreement, the fact that the Security Agreement granted GE a certain remedy did not preclude GE from exercising remedies granted under the Reimbursement and Note Purchase Agreements.

In support of its argument, Euralair cites a note from GE to

Euralair dated September 17, 1992. In this note, John Berten (the General Manager of GE's International Sales Department) wrote:

> I AM PLEASED TO REPORT THAT OUR LEGAL AND FINANCIAL CONSULTANTS HAVE FINISHED THEIR REVIEW OF THE POSSIBLE IMPACT OF COMPLETING THE ARRANGEMENTS OF OUR GENERAL TERMS AGREEMENT. WITH THIS REVIEW NOW AVAILABLE, WE HAVE MET OUR SENIOR MANAGEMENT, AND HAVE SECURED THEIR AGREEMENT TO PROCEED WITH THE NECESSARY PAPERWORK TO COMPLETE OUR NEGOTIATIONS.
>
> GROUNDWORK ALREADY COMPLETED WITH OUR INVESTMENT BANKER[.] INDICATES THAT THEY WILL BE ABLE TO PROVIDE A FIRST DRAFT LOAN AGREEMENT FOR YOUR INSPECTION WITHIN FIVE WORKING DAYS. SIMIL[ARLY], WE CAN HAVE A DRAFT SECURITY AGREEMENT IN THE SAME LENGTH OF TIME. OUR DRAFT GENERAL TERMS AGREEMENT IS ALREADY PREPARED. . .[8]

Cutner Aff. Ex. 13. Euralair contends that through this note, "GE agreed to Euralair's pledging its contract with Boeing as security against the payment made to Euralair." Def. Mem. at 9. "Berten's note . . . indicates that GE accepted the security agreement proposed by

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[8]The rest of the note proposes a time and place for meeting and suggests who should be present at the meeting. The note also states that if Euralair agrees "with this plan," Euralair should indicate its agreement by return fax, "which will serve as an extension of our [GE's] proposal agreement dated August 10, 1992." Cutner Aff. Ex. 13.

Euralair, granting GE the right to assume Euralair's responsibilities if Euralair failed to fulfill its obligation of placing a firm order for the Spare Engine." Id. at 11-12. Even if this note could signify GE's acceptance of a security agreement proposed by Euralair, the security agreement signed by GE and Euralair allowed GE to pursue alternate remedies. Euralair's invocation of the Security Agreement fails to raise an issue of material fact regarding whether Euralair is in default of the Reimbursement Agreement and the Note Repurchase Agreement.

C. The Advance Did Not Have to be Repaid

Finally, Euralair contends that GE "assur[ed] [Euralair] that the Introductory Allowance need not be reimbursed by Euralair." Def. Mem. at 3. However, Euralair cites only a single piece of evidence to support its claim that GE made such assuranes. That "evidence" is a single page excerpted from a longer document, dated February 10, 1992. See Cutner Aff. Ex. 4. (The page shown is Page 6 and contains no signatures.) The page contains a section entitled "Introductory Allowance" and refers to a $10 million introductory allowance from GE which "will be earned by Euralair, on a pro rata basis, upon delivery of four (4) GE90-B4 engines to TBC for installation on Euralair's two (2)

firm 777 aircraft." Id. The context in which Euralair cites this document suggests that the page may be a portion of a proposal from GE from the General Agreement between GE and Euralair regarding the sale of the jet engines. See Def. Mem. at 5-6. Euralair suggests in its brief that GE and Euralair were still negotiating at that point, and that GE was competing with other engine manufacturers for the sale to Euralair. In addition, the next paragraph of the page refers to"[t]this proposal and any contract resulting therefrom . . ." Cutner Aff. Ex. 4; see also Def. Mem. at 6 (stating that "on March 10, 1992, GE came back with a new proposal . . .").

Assuming that the cited document is a proposal from GE to Euralair, it does not raise a genuine issue of material fact as to whether Euralair breached its agreements with GE. Both the Note Purchase Agreement and the Reimbursement Agreement contain integration clauses. See Cplt. Ex. A, § 13.6 ("Subject to [certain warranties], this Agreement embodies the entire agreement and understanding between the Noteholder and the Paying Agent and [Euralair] and supersedes all prior agreements and understandings relating to the subject matter hereof"); Cplt. Ex. D, § 9.11 ("Other than the terms and provisions

contained in the Security Agreement, this Agreement embodies the entire agreement and understanding between [Euralair] and [GE] and supersedes all prior agreements and understandings relating to the subject matter hereof"). However, extrinsic evidence is inadmissible for the purpose of construing integrated agreements. See W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y. 2d 160, 163 (1990) ("when parties set down their agreement in a clear, complete document. . . [e]vidence outside the four corners of the document . . . is generally inadmissible to add to or vary the writing") (citations omitted).[9]

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[9]Euralair's remaining arguments are easily disposed of. Euralair's President, Alex Couvelaire, states that:

> I was told that this $10,000,000 payment on the total $20,000,000 Allowance need not be reimbursed since this amount would be deducted from the Introductory Allowance earned, pro-rata, on Euralair's two GE90-B4 engines upon delivery of four GE90-B4 engines for installation in Euralair's two 777 Boeing aircraft.

Affidavit of Alexandre Couvelaire, annexed as Def. Ex. 19, ¶ 7; see also Def. Mem. at 7 (contending that Couvelaire remembers that the $10 million "would not be a real loan, because Euralair would not have to reimburse it"). However, where, as here, the terms of a contract are unambiguous, "parol evidence is inadmissible to create an ambiguity." Readco, Inc. v. Marine Midland Bank, 81 F. 3d 295, 299 (2d Cir. 1996) (citing W.W.W. Assocs., 77 N.Y. 2d at 162-163). Thus Couvelaire may not create a triable issue of fact by contradicting the unambiguous terms of a written contract.

V. Affirmative Defense

Euralair asserts the doctrine of promissory estoppel as an affirmative defense. According to Euralair, GE said it would give Euralair "price rebates, financing and credit terms if Euralair purchased two Boeing 777 airplanes, both equipped with two GE jet engines, and placed an order with GE for a spare engine." Answer ¶ 2. Further, GE "relentlessly pursued nego[t]iations" with Euralair, "despite the fact that GE knew Euralair had absolut[e]ly no funds with which to purchase those engines." Id. ¶ 4. Euralair refers repeatedly to "statements" made by GE, and alleges that Euralair relied on those statements in accepting the contract and financing agreements with GE. Id. ¶ 6; see also id. ¶¶ 7-8. However, the only statement alleged by

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Euralair also contends that the evidence demonstrates the existence of a genuine issue of material fact "because" (1) if Couvelaire had not been certain that Euralair could relinquish its contract if it were unable to order a spare GE engine, "he would never have caused Euralair to enter into [a] contract with GE, " and (2) GE would have not have entered into a contract with Euralair if GE "had not been certain to hold a security from Euralair for allowances GE paid to Euralair." Def. Mem. at 12-13. The second contention is speculative and irrelevant. And while the first contention maybe true, it does not change the fact that Euralair did enter into agreements with GE, and that these agreements allowed GE to demand prepayment if Euralair failed to order to a spare GE engine by April 30, 1995.

Euralair that addresses the repayment of the $10 million advance is the following: "GE told Euralair that. . . Euralair could repay the advance itself, [ ] amounting to $10 million in principal with the funds earned, pursuant to the contract Euralair had with a large French government-owned commercial airline, since plaintiff GE was well aware the defendant, Euralair, had no funds." Id. ¶ 2.

Beyond that, Euralair alleges only that "Euralair was under the impression that GE could take back its two engines through its affiliate GECA, a leasing corporation, 100% owned by GE, if the payment of those engines fell into default." Id. ¶ 5. Euralair also alleges that "at that time it made those statements, [GE] knew they were false in that GE had inserted a clause in. . . the Reimbursement Agreement . . . whereby [GE] may, in its sole discretion, issue a prepayment instruction . . ." Id. ¶ 7 (emphasis in original). Finally, Euralair contends that "[i]n December 1992, GE had led Euralair to believe that GE would never accelerate the payment of the notes because of the longstanding relationship between the two companies." Id. ¶ 10.

The elements of a defense of promissory estoppel are: a clear and unambiguous promise, reasonable and foreseeable reliance on that

promise, and unconscionable injury as a result of that reliance. See City of Yonkers v. Otis Elevator Co., 844 F. 2d 42, 48 (2d Cir. 1988) (applying New York Law) (citing Ripple's of Clearview, Inc. v. Le Havre Assoc., 88 A.D. 2d 120, 121-23 (2d Dep't), appeal denied, 57 N.Y. 2d 609 (1982)). Euralair's allegations fail to state a clear and unambiguous promise. Allegations that Euralair was "under the impression" that it would not have to pay back the advance are insufficient. Similarly, a claim that GE told Euralair it could pay back the advance out of its proceeds from Euralair's contract with the government airline does not allege a clear promise by GE that it would not issue a prepayment instruction. While Euralair argues that an "unambiguous promise" is found in John Berten's note dated September 17, 1992 and in other notes discussing the proposed security agreement between GE and Euralair, those notes and letters can in no way be construed as promises by GE not to issue a prepayment instruction. Also, as stated earlier, Euralair has not alleged any modifications to any of the financing agreements.[10]

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[10]Each Agreement provides that any modifications must be made in writing and signed by all parties to the agreement. See Cplt. Ex. A, § 13.3; Cplt. Ex. C, § 11(d); Cplt. Ex. D, § 9.6; Cplt. Ex. E, § 9.13.

Absent an allegation of a clear and unambiguous promise, Euralair's affirmative defense is unavailing. However, the affirmative defense fails on the second element as well: while Euralair has alleged that it "entered into the . . . financing agreements" in "reliance on [the] words of GE" (Answer ¶ 8), this reliance is not reasonable. The clear language of the Reimbursement Agreement vested in GE the sole discretion to decide whether to issue a prepayment instruction. See Danann Realty Corp. v. Harris, 5 N.Y. 2d 317, 320-321 (1959) (specific term of contract "destroy[ed] the allegations" that "agreement was executed in reliance upon . . . contrary oral representations") (citations omitted). Therefore, Euralair may not invoke the defense of promissory estoppel. See R.G. Group, Inc. v. Horn & Hardart Co., 751 F. 2d 69, 78-79 (2d Cir. 1984) (summary judgment appropriate in contract case absent allegation of clear promise or reliance).

Because Euralair has failed to raise any genuine issue of material fact regarding its obligations under the financing agreements, GE's motion for summary judgment is granted. Euralair must repay GE the $10 million advance, along with interest, expenses and attorneys' fees to be determined by the Court upon application by GE.

VI. Motion to Dismiss Euralair's Counterclaim

A. Legal Standard for Motion to Dismiss

In evaluating a motion to dismiss, a court must accept as true the factual allegations contained in the complaint. See Cohen v. Koenig, 25 F. 3d 1168, 1171 (2d Cir. 1994). All reasonable inferences must be drawn in favor of the non-moving party on such a motion. See Allen v. West Point-Pepperell, Inc., 945 F. 2d 40, 44 (2d Cir. 1991). Moreover, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [claimant] can prove no set of facts in support of [its] claim which would entitle [it] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

B. Substance of Counterclaim

In its counterclaim, Euralair alleges that "GE breached its obligation of good faith and fair dealing to Euralair in the following respect[s]:"

> (a) by suddenly issuing [a] Prepayment Instruction without affording Euralair a reasonable opportunity to find an assignment of the contract or to obtain substitute financing;
>
> (b) by arbitrarily refusing to cooperate with Euralair in any attempt to restructure Euralair['s] financing in a manner which would reduce GE['s] exposure while at the same time

assuring Euralair's ability to continue operations;

(c) by issuing Plaintiff's Prepayment Instruction under the Reimbursement Agreement creating an Event of Default under that Agreement and a Default under the Note Purchase Agreement.

Answer ¶ 20. Euralair asserts that GE's "culpable conduct" in issuing a prepayment instruction when "it would have chosen not to do so" was the sole cause of GE's financial losses. Id. ¶ 21. Finally, Euralair claims that GE's "irresponsible action" led to Euralair's exposure "to multiple liabilities under the various financing agreements." Id. ¶ 22.[11]

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[11] In its brief, Euralair appears to recharacterize its counterclaim as a counterclaim for fraudulent inducement. Def. Mem. at 24. Even if Defendant were granted leave to amend to plead such a claim, it would be dismissed. A claim of fraudulent inducement fails when the alleged misrepresentations conflict with unambiguous terms of the contract at issue. See Danann Realty Corp., 5 N.Y. 2d at 320-321 (affirming dismissal of fraudulent inducement claim because specific terms of contract preclude parol evidence of reliance on alleged misrepresentations); Citibank, N.A. v. Plapinger, 66 N.Y. 2d 90, 94-95 (1985) (guarantee to bank that was expressly "absolute and unconditional" could not be avoided by claim that guarantee was fraudulently induced through bank's alleged oral promise to supply additional line of credit). According to Euralair, GE induced it to enter into the financing agreements by promising to pursue remedies only under the Security Agreement in the event of Euralair's default. However, as described in Part IV. B., supra, the Security Agreement and the Reimbursement Agreement expressly and unambiguously conflict with this alleged promise by providing that GE's remedies are cumulative and non-exclusive. See Cplt. Ex. D, § 7.3; Second Marcu Aff. Ex. 1, § 5.5. Thus a counterclaim by Euralair for fraudulent inducement must fail.

C. Application of Standard

In order to state a claim for breach of the implied covenant of good faith and fair dealing, Euralair must allege that GE affirmatively sought to prevent Euralair's performance under or to withhold the benefits of the financing agreements. See, e.g., Collard v. Incorporated Village of Flower Hill, 75 A.D. 2d 631, 632 (2d Dep't 1980) (dismissing claim for breach of implied covenant of good faith and fair dealing because allegation that defendant acted arbitrarily is not equivalent to allegation that defendant deprived plaintiffs of any benefits to which they were entitled, aff'd, 52 N.Y. 2d 594 (1981); Rexnord Holdings, Inc. v. Bidermann, 21 F. 3d 522, 526 (2d Cir. 1994) (covenant "only precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement") (internal quotation and citation omitted).

Furthermore, one party may "'act on its own interests in a way that may incidentally lessen' the other party's anticipated fruits from the contract" without breaching the implied covenant. M/A-COM Sec. Corp. v. Galesi, 904 F. 2d 134, 136 (2d Cir. 1990) (quoting Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 30

N.Y. 2d 34, 46, cert. denied, 409 U.S. 875 (1972)). The fact that a party seeks to restructure a financing arrangement when default appears imminent but later elects to enforce its rights under the contract does not constitute a breach of the covenant. See Rexnord Holdings, 21 F. 3d 526 (plaintiff did not break covenant by agreeing to extend the time for payment (at defendant's request) in return for release of other unrelated obligations, but subsequently seeking to collect money owed).

Euralair has not alleged that GE did anything to prevent it from performing under their agreements. Nor has Euralair alleged that GE acted to deprive Euralair of the benefits of the agreements. Euralair's contention that GE's decision to issue a prepayment instruction was "irresponsible," "sudden," and "arbitrary" is not equivalent to an allegation that GE prevented Euralair from performing. Rather, Euralair admits that it entered into agreements giving GE the right to issue a prepayment instruction if Euralair did not order a spare engine by April 30, 1995, and requiring Euralair to comply with such a prepayment instruction or be in default of the agreements. Consequently, Euralair has failed to state a claim for breach of the implied covenant of good faith and fair dealing, and its counterclaim

must be dismissed.

VII. Request for Joinder

Finally, in its memorandum of law, Euralair requests permission to join the president of Euralair, Alex Couvelaire, as a plaintiff in this action in order to "recover against GE for defamation of his character." Def. Mem. at 29-30. Euralair cites Fed. R. Civ. P. 18 in support of its request. Id. Euralair contends that GE has stigmatized Couvelaire by spreading rumors "throughout the aviation community" and that a "charge of stealing has been publicly disclosed, naming President Couvelaire as [a] thief." Def. Mem. at 29.

Euralair has not followed the correct procedure for requesting joinder of a party. If Euralair wishes to join Couvelaire as a party, it must make a formal motion to do so. But even if Euralair were to so move, the motion would be denied.

In support of its request, Euralair has cited Rule 18, which governs the joinder of claims by parties to the action. Because Couvelaire is not a party to this action, he must look to Rule 20(a), which governs the permissive joinder of parties. Under that rule, permissive joinder is appropriate if a proposed party "assert[s] any

right to relief . . . arising out of the same transaction, occurrence, or series of transactions or occurrences" underlying the original action. Even if the contentions in Defendant's memorandum were formal allegations, they would not support a finding that Couvelaire's proposed defamation claim arises out of the same transaction or occurrence as GE's breach of contract claims against Euralair. There is no suggestion that the alleged defamation is in any way connected to the alleged breach by Euralair of agreements it made with GE.[12]

VII. Conclusion

For the reasons stated above, Plaintiff's motion for summary judgment is granted. Euralair must repay GE the $10 million advance, along with the interest, expenses and attorneys' fees to be determined by the Court upon application by GE. Further, Defendant's request for joinder is denied, and Plaintiff's motion to dismiss Euralair's counterclaim is granted.

SO ORDERED:

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[12]Even if Euralair meant to allege that GE defamed Couvelaire in its complaint, such a claim would fail because allegations in a complaint are subject to an absolute privilege. See Vevaina v. Paccione, 125 A.D. 2d 392,393 (2d Dep't 1986), appeal denied, 69 N.Y. 2d 607 (1987).

SHIRA A. SCHEINDLIN, U.S.D.J.

Dated: New York, New York
July 26, 1996

Appearances

Counsel for Plaintiff

Aaron R. Marcu, Esq.
Howard, Darby & Levin
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(212) 841-1000

Counsel for Defendant

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1, rue de l'Hospitalet
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France

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| GENERAL ELECTRIC COMPANY, | : | JUN 11, 1997 |
| Plaintiff, | : | |
| -against- | : | ORDER AND AMENDED |
| COMPAGNIE EURALAIR, S.A., | : | FINAL JUDGEMENT |
| Defendant. | : | |

WHEREAS, a motion by plaintiff General Electric Company pursuant to Rules 12(b)(6) and 56 of the United States Federal Rules of Civil Procedure for summary judgment in its favor and for a judgment dismissing the counterclaim of defendant Compagnie Euralair, S.A., was duly briefed and brought on to be heard by competent counsel for each party, i.e., Howard, Darby & Levin for Plaintiff General Electric Company and Rolande Cutner, Esq., for Compagnie Euralair, S.A.; and

WHEREAS, the United States District Court for the Southern District of New York, has personal and subject matter jurisdiction over both parties by virtue of the diverse citizenship of the parties and written contracts, dated December 22, 1992, in which both parties

irrevocably submitted to the jurisdiction of that court and to have the dispute between them governed by the law of the State of New York; and

WHEREAS, on July 26, 1996, this Court, issued an Opinion and Order granting the plaintiff's motion and directing that judgment be entered upon consideration of plaintiff's Application for interest, fees and expenses as provided in the contracts sued upon, on the ground that, under the laws of the State of New York, Compagnie Euralair was in breach of the terms of the agreements between the parties and failed to establish affirmative defenses of promissory estoppel or fraud or a counterclaim for breach of implied covenant of good faith and fair dealing; and

WHEREAS, the order of the Court is immediately enforceable; and

WHEREAS, due consideration has been given to the foregoing Application and to any responses thereto;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that, for the reasons stated in the Court's Opinion and Order of July 26, 1996, plaintiff General Electric

Company's motion for summary judgment is granted; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff General Electric Company's motion to dismiss defendant Compagnie Euralair, S.A.'s counterclaim for breach of implied covenant of good faith and fair dealing is granted; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED that defendant Compagnie Euralair, S.A.'s request for joinder is denied; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED that plaintiff General Electric Company shall have judgment against defendant Compagnie Euralair, S.A. in the amount of $10 million free and clear of any taxes, deductions or withholdings as provided in the contracts sued upon; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED, that plaintiff General Electric Company shall have judgment against defendant Compagnie Euralair, S.A., for contractual pre-judgment interest for the period from September 8, 1995, to and including May 1, 1997, in the amount of $1,432,889; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED and

DECREED, that plaintiff General Electric Company shall have judgment against defendant Compagnie Euralair, S.A., for contractual pre-judgment interest for the period from May 2, 1997, to and including the date hereof in an amount equal to the product of $2,416.67 multiplied by 68 days (the number of days from May 2, 1997, to and including the date hereof), for a total of $164,333.56; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED, that plaintiff General Electric Company shall have judgment against defendant Compagnie Euralair, S.A., for contractual post-judgment interest from the date hereof until Euralair has paid the foregoing $10 million in an amount to be calculated according to the terms of the Note Purchase Agreement; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED, that plaintiff General Electric Company shall have judgment against defendant Compagnie Euralair, S.A., for fees and expenses incurred by General Electric Company in connection with the exercise and enforcement of its rights under the contracts sued upon, in the amount of $83,423; and

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND

DECREED that plaintiff General Electric Company shall have judgment against defendant Compagnie Euralair, S.A., for fees and expenses incurred hereafter by General Electric Company in connection with the enforcement of this judgment upon submission to an approval by this court by a supplemental application for such costs, fees and expenses; and accordingly

IT IS FURTHER HEREBY ORDERED, ADJUDGED and DECREED, that the Complaint is dismissed and the case is removed from the court's active calendar.

Dated: July 8, 1997

SHIRA A. SCHEINDLIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED U.S.D.C.
JUL 30 1997
S.D. OF N.Y.

----------X

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellee,

Civil Action Docket No.
96-Civ. 0884(SAS)

-against-

COMPAGNIE EURALAIR, S.A.,

NOTICE OF APPEAL

Defendant-Appellant.

----------X

Please take notice that COMPAGNIE EURALAIR, S.A. hereby appeals to the United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, New York from the amended final judgment entered by the United States District Court, Southern District of New York (Hon. Shira Sheindlin, Judge), dated July 8, 1997. This appeal is taken from each and every part of said order as well as the whole thereof and will also seek review of the order dated July 26, 1996 upon which the amended the judgment is based.

Dated: July 18, 1997

Respectfully submitted,

ROLANDE CUTNER, ESQ. (RC 1412)

Attorney for Defendant-Appellant
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TO:

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Clerk, United States District Court

SDNY/NYNY
96-CV-884
SCHEINDLIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FILED
SEP 30 1998

**SUMMARY ORDER**

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUY MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30 day of Sept., one thousand nine hundred and ninety-eight.

PRESENT:

Honorable Pierre N. Leval,
Honorable Jose A. Cabranes,
Honorable Rosemary S. Pooler,
Circuit Judges.

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General Electric Company,
Plaintiff-Appellee,

v.

97-7946

Compagnie Euralair, S.A.,
Defendant-Appellant.

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**APPEARING FOR APPELLANT:** Rolande Cutner, New York, N.Y.

**ANSWERING FOR APPELLEE:** Aaron R. Marcu, Howard, Smith & Levin, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the order of the District Court be and it hereby is **AFFIRMED**.

Euralair appeals from the district court's order granting summary judgment to General Electric ("GE") and dismissing Euralair's counterclaim. Euralair contends that GE failed to submit sufficient evidence that it properly acquired the noteholder's rights or that GE complied with the applicable securities laws; that parol evidence is admissible to show the Financing Documents constituted a sham transaction that did not create an enforceable obligation for Euralair to repay the $10 million advance; that parol evidence should be admitted to prove the existence of GE's oral promise that it would take the assignment of Euralair's rights under the Euralair-Boeing contract as satisfaction of the $10 million advance; that GE should be equitably estopped from exercising any remedy other than taking possession of the security; and that the court erred in dismissing Euralair's affirmative defense and counterclaim for breach of the implied covenant of good faith and fair dealing.

Several of plaintiffs' contentions are not properly raised on appeal as they were not argued to the district court. As for the remaining claims, we affirm substantially for the reasons stated by the district court.

**AFFIRMED**

FOR THE COURT:
CAROLYN CLARK CAMPBELL, CLERK

By: Lucille Carr, Deputy Clerk

# UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT
## UNITED STATES COURT HOUSE
## 40 FOLEY SQUARE
## NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-ninth day of October one thousand nine hundred and ninety-eight.

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General Electric Company,

Plaintiff-Appellee,

v.

Compagnie Euralair, S.A.,

Defendant-Appellant.

USCA
Filed Oct 30 1998
Second Circuit
Dkt. No. 97-7946

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Compagnie Euralair, S.A.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that vote be taken thereon.

**FOR THE COURT**

CAROLYN CLARK CAMPBELL, Clerk

By:_____
Beth J. Meader,
Administrative Attorney